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IN THE

Supreme Court of the United States

October Term, 1961.

No. 964.

MAIN LINE THEATRES, INC.,

Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.,

Respondents.

309 DRIVE-IN CORP.,

Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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The opinion of the District Court for the Eastern District of Pennsylvania (102a-109a)[1] is reported at 189 F.

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1. Record references to petitioners' appendix are to "a" pages. References to respondents' appendix are to "b" pages. These appendices have been filed in this Court. References to the appendix to the petition for certiorari are to "Pet. App."

Supp. 314 (E. D. Pa. 1960). The opinion of the Court of Appeals for the Third Circuit (Pet. App. 4a-12a) is reported at 298 F. 2d 801 (1962).

JURISDICTION.

The judgment of the court of appeals was entered on January 16, 1962. The order denying a petition for rehearing was filed on February 14, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Whether both courts below erred in holding that petitioners entered into an agreement completely settling these cases.

STATEMENT.

Since the decisions of the court of appeals and the district court turn upon a full and correct understanding of the facts involved, it is important to present these facts accurately. We make such a presentation in this brief in opposition. Petitioners' statement of the case is both inadequate and misleading and falls far short of an accurate recital of the facts disclosed in the record.

During the negotiations which resulted in the settlements hereinafter described, petitioners, two corporations, were owned and controlled by V. C. Smith (50b). In July, 1960, subsequent to the time of settlement of these suits in May, 1960, Mr. Smith caused petitioners to sell their theatres and assign their causes of action to two corporations controlled by Claude J. Schlanger (84a, 66b, 57b). This petition, as was the appeal to the court below, is being prosecuted by the assignees of petitioners' causes of action (7b, 8b).

These two cases were included in a group of ten antitrust actions—all alleging substantially identical causes of action against distributors of motion pictures—instituted in 1958 and 1959 in the United States District Court for the

Eastern District of Pennsylvania, by Edwin P. Rome, Esquire, on behalf of various Pennsylvania motion picture exhibitors (102a, 10b). The first of these cases assigned for trial was a suit by Colonial Amusement Company, scheduled to begin on May 16, 1960, before Judge Francis L. Van Dusen (9b, 20b, 76a). The remaining cases in the group were assigned to Judge Van Dusen for the purpose of settlement discussions with counsel (9b). Since trial of the Colonial case was imminent and settlement was a possibility, Judge Van Dusen urged counsel to meet and try to reach an agreement of settlement as promptly as possible (10b, 13b). Thereafter, serious settlement negotiations took place between counsel, and progress was discussed between counsel and Judge Van Dusen (10b, 19b, 141b).

Early in the course of these discussions, counsel for respondents made clear to Mr. Rome and to Judge Van Dusen that respondents were willing to negotiate a settlement of all ten actions but was unwilling to settle less than all, since all cases involved a common question relating to respondents' distribution procedures (23a, 38a, 10b, 19b, 141b). Accordingly, Mr. Rome represented to counsel for respondents that he had made an evaluation of each of the cases and practical bargaining began on a case by case basis, which protected the interests of the individual plaintiffs (10b). The total amount agreed upon in settlement of all ten thus represented the sum of values placed on the individual cases (38a, 44a, 11b, 102b, 134b-137b, 141b). Respondents authorized their counsel to pay this total, reached by adding the specific amounts assigned to each case, if all of the Pennsylvania cases could be settled (38a, 44a, 50a).

As already noted, the trial of the Colonial Amusement case was scheduled to begin on May 16, 1960. On May 12, 1960, it appeared that counsel were about to reach a settlement agreement relating to all ten cases and respondents' counsel forwarded stipulations for dismissal and releases to Mr. Rome for execution by his clients, including petitioners (12b, 29b, 123b). The trial of the Colonial Amuse-

ment case was continued to Monday, May 23, 1960 (19b-20b).

By Friday, May 20, 1960, based upon valuations placed on the individual cases by Mr. Rome and the bargaining on that basis, respondents' counsel had obtained authority to pay individual amounts totalling $85,000 to settle the ten Pennsylvania cases (23a, 10b-11b, 102b, 136b).[2] By that day, May 20, 1960, Mr. V. C. Smith had advised Mr. Rome that he was willing "to settle" the two cases involved herein for the total sum of $10,000 (17a, 19a, 35a, 43a, 72a, 67b). This was the amount which respondents' counsel was authorized to pay to settle Mr. Smith's cases (102b, 136b).

On Friday, May 20, 1960, after drawing the jury for the Colonial Amusement trial, counsel for all parties met in chambers with Judge Van Dusen and reported the status of settlement negotiations (11b-12b). Mr. Rome stated that the amounts offered with respect to two of his other clients, as part of the total offer of $85,000, would not be

2. We have emphasized, and the record fully supports our position, that the total amount of the payment which respondents' counsel was authorized to make was reached by adding the amounts bargained out as to the individual cases. Petitioners try to create the erroneous impression that respondents' counsel offered a lump sum or "package" figure for settlement of the 10 cases, unrelated to the individual cases (Pet. 6). They use as a basis for that suggestion a fragmented quotation from the testimony of respondents' counsel that "* * * [t]here is no authority to offer an allocated portion of the $95,000." (50a). Petitioners' use of the quoted testimony is misleading. This statement referred to the fact that respondents were unwilling to settle one case without settling the others. As discussed, *infra*, p. 7, this testimony related to the period in August and September, 1960, when, in view of Mr. Smith's position in these cases, consideration was being given to the possibility of disposing of the other 8 cases. Mr. Rome urged that this be done and Judge Van Dusen inquired as to respondents' position at the hearing held on September 12, 1960. See *infra*, p. 7. The $95,000 figure used in the quotation was agreed upon in August in order to satisfy Mr. Rome and two of his other clients, but still represented a total of various amounts applicable to the individual cases. See *infra*, p. 6.

sufficient to satisfy those plaintiffs (13b). On Saturday, May 21, 1960, an offer of an additional $2,500, or $87,500, was communicated to Mr. Rome (23a-24a, 13b, 14b). On Sunday, May 22, 1960, respondents' counsel obtained authority to offer an additional $2,500, or a total of $90,000, for the ten cases and communicated the $90,000 offer to Mr. Rome (26a, 14b).

The offer was accepted by Mr. Rome, and Judge Van Dusen was informed on Monday morning, May 23, 1960—the day that trial was to begin—that the "cases", including petitioners', were "settled" (14b, 38a, 59a, 60a, 96a). Judge Van Dusen requested that the settlement documents for all of the cases, which had previously been forwarded to petitioners' counsel, be executed and returned to him within a week (15b).

The settlement figures applicable to the two cases here involved remained at $5,000 each. The fact that $10,000 was the settlement figure here applicable has never been questioned (43a, 37b, 81a) and was found by both courts below (106a; Pet. App. 7a).

By letter of May 25, 1960, Mr. Rome notified Mr. Smith that the cases were settled for $10,000 and forwarded the releases to Mr. Smith for execution. On May 26, 1960, Mr. Smith informed Mr. Rome by telephone that the following clause of the releases was objectionable (30b, 110b):

> "[Petitioner] agrees that its present availability and the present procedure pursuant to which it licenses motion pictures is reasonable."

Mr. Rome informed Mr. Smith that there was no need to question that particular language because Mr. Rome and respondents' counsel had discussed the reason for such language, and had agreed that it was reasonable and justifiable (30b, 31b). Mr. Smith said he would think about it (31b). Mr. Rome and Mr. Smith did not again discuss these cases or the language of the release with each other until August 22, 1960 at the earliest (17a, 81a). Mr. Rome had the view

that any problems with the release had been resolved and that his immediate settlement problem was a question of amount with two of his clients in other cases (33b, 81a).

Correspondence between counsel, and between the trial judge and counsel, was had in June and July, 1960, with regard to the delay in completing the settlement documents pursuant to the May agreement (21a, 18b, 20b-21b, 115b, 138b, 131b, 99a). Mr. Rome advised respondents' counsel that the delay was still being caused by some difficulty with two of his clients in other cases, the Reo and Dembow cases (21b, 22b).

On or about August 10, 1960, Mr. Rome advised respondents' counsel that he was still having difficulty with his two other clients, but that if the respondents would pay an additional $5,000, or a total of $95,000, all the settlement documents would be signed (27a, 22b, 39b). Shortly thereafter, sometime before August 19, Mr. Rome was advised that, while the respondents considered each of the ten cases settled on May 23, 1960, they would pay the additional $5,000. These additional moneys were not applicable to the two cases here involved (37a, 21b-23b, 100b).

Thereafter, on Friday, August 19, 1960, Mr. Smith, for the first time, advised Mr. Rome's office that petitioners had, by agreement dated July 22, 1960, transferred their interest in the petitioners' Main Line and 309 Drive-In theatres to companies owned by Claude J. Schlanger. Mr. Rome received that message on August 22, 1960 (38a, 78a, 34b), and called respondents' counsel the same day and advised them of the sale and that petitioners would not execute the settlement documents (23b, 26b, 79a).

Negotiations between Mr. Smith and Mr. Schlanger for the transfer of petitioners' theatres and these actions began sometime prior to April, 1960 (48b) and, on July 3, 1960, two corporations controlled by Mr. Schlanger took over operation of the theatres. The final agreements were executed on July 22, 1960 (84a), when Messrs. Smith and Schlanger also reached an understanding concerning as-

signment of these two law suits to Mr. Schlanger's corporations, which was later reduced to writing (66b, 57b). Mr. Rome did not learn of the purported assignment of the causes of action until at least August 25, 1960 (35b-36b, 143b) and did not participate in these transactions.

By the terms of the purported contract for the assignment of these two law suits, Mr. Smith would receive $10,000 from any recovery by way of judgment against or settlement with respondents, plus 40% of any recovery over $25,000; and, in any event, the assignees would be obligated to pay Mr. Smith no less than $10,000 at the end of three years, regardless of the status or outcome of the litigation (58b, 126b-127b).[3]

In view of Mr. Smith's refusal to execute the settlement documents in his cases, Judge Van Dusen held a hearing on September 12, 1960 (11a-65a), as a result of which, and in deference to the views expressed by Judge Van Dusen, the respondents paid $85,000 to complete settlement of the other eight cases and the releases in those cases were executed and delivered (43b, 107b). Also at the suggestion of Judge Van Dusen, and with the acquiescence of Mr. Rome who was still counsel for petitioners, respondents thereupon filed petitions to have these cases dismissed with prejudice on the ground that they had been settled (48a-49a, 66a-67a).

A hearing on these petitions for dismissal was held before Judge Van Dusen on September 26, 1960. At the outset of this hearing, Mr. Rome withdrew as counsel for petitioners (7b). At no time during the settlement negotiations, from their inception and continuing to the day of that hearing, had any question been raised with regard to Mr. Rome's full authority to act in these cases on behalf

3. The assignment document is purposely referred to as a "purported" agreement or contract because it is of doubtful validity. **Restatement of Contracts**, § 542. Mr. Smith's avowed purpose in these "assignments" was to "gamble" and possibly reap "richer rewards" (61b, 62b).

of the petitioners (14b, 15b, 21b, 27b, 28b). Mr. Smith never instructed Mr. Rome that he no longer represented petitioner corporations (63b) and Mr. Rome was never requested to withdraw his appearance as counsel for petitioners in these cases (35b, 59b).

At the September 26th hearing, opposition to respondents' petitions was actively undertaken by Mr. Ball who appeared as counsel for petitioners' assignees (7b, 8b). Messrs. Smith and Schlanger personally appeared and testified at the hearing.

On November 10, 1960, Judge Van Dusen filed an opinion in which he held that Mr. Rome had authority to settle these two cases and that he did settle them on May 23, 1960 (104a, 106a-107a). The trial judge noted that Mr. Smith's objection to the release was too late because it came after Mr. Rome had concluded the settlement agreement, and also that the objectionable part of the release was normal and reasonable under the circumstances. He concluded that Mr. Smith's remedy, if his objection was valid, was to insist on a different form of release (104a) and that this obstacle to enforcement of the settlement contract was removed by respondents' agreement to eliminate the language to which Mr. Smith and his assignee objected (104a, 108a).

Upon refusal of petitioners to execute the releases as modified by the district court's order, orders were entered dismissing the cases, in their entirety, with prejudice, upon deposit by respondents with the Clerk of the District Court of $10,000 for the account of petitioners (111a). Appeals to the court of appeals followed.

In their appeals, petitioners contended for the first time that, although they agreed to accept $10,000 as damages, they objected to the release because it would extinguish their claim for injunctive relief, that they had not agreed to settle that part of the suit, and that Mr. Rome had no authority so to agree.

On January 16, 1962, the court of appeals (Hastie, Circuit Judge), filed an opinion affirming Judge Van Dusen's holding that a valid settlement contract was made in May, 1960. The court below concurred in the trial judge's finding that counsel for petitioners and respondents, acting within their authority, agreed "to settle these suits for a total sum of $10,000", pointing out that "the record warranted a finding that the negotiations reached a point where mutual assent had been expressed orally to settle the litigation for $10,000" (Pet. App. 6a-7a). In construing the mutual assent of the parties to "settle these suits", the court concluded that, with respect to a case demanding both injunctive relief and a claim for damages,

> "* * * a reasonable person [petitioners] agreeing, without any expression of limitation, *to accept* a sum in settlement of the litigation should and reasonably would understand that both aspects of the suit were covered by the settlement. Certainly, a defendant [respondents] *offering* a sum in settlement of a suit asking, among other things, for an injunction against certain conduct, would not understand that a similar demand could be asserted the day after settlement. This reasonable understanding [of petitioners-offerees *and* respondents-offerors] determines the meaning of the assent expressed by the *parties* here" (Pet. App. 8a). (Emphasis added).[4]

Therefore, concluding, as did the district court (10-4a), that agreement to settle both aspects of the suits was reached before any controversy arose about the form of the release (Pet. App. 8a), it was the view of the court below that respondents were entitled to the form of release they

4. In a typical use of an out-of-context quotation, petitioners quote only the last two sentences of the above quotation in an attempt to imply that the court below relied only upon the intention of respondents, not on the intention of both parties to the agreement (Pet. 13).

tendered, that the release offered no justification for petitioners' attempted repudiation of the agreement, and that it was immaterial that respondents subsequently consented to modify the release (Pet. App. 8a-9a).

Similarly, since it was undisputed that Mr. Rome had full authority "*to* settle the litigation for $10,000", the court concluded that he had authority to settle the suits as a whole, including the prayer for injunctive relief as well as the prayer for damages (Pet. App. 9a).

The court of appeals then decided that, even though respondents' promise to pay $10,000 was conditioned upon settlement of the eight other cases, a valid bilateral contract arose because respondents' promise was not illusory and was acceptable to petitioners, through their counsel (Pet. App. 9a-10a).

Finally, the court of appeals rejected petitioners' contention, raised for the first time in that court, that factual issues involved in the respondents' petitions to dismiss should have been heard by a jury. The court held that petitioners' failure to seek a jury determination of those questions and their acquiescence in the disposition of the matter by the trial judge, was a waiver of any such right.

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5. This was also the view of the district court judge (104a, ftn. 5) although he considered it unnecessary to decide the specific question (108a), because respondents were willing to accept a modified release even though they did not have to do so. The court of appeals accepted the parties' construction of the objectionable clause as terminating petitioners' right to injunctive relief against respondents' conduct challenged in these suits (Pet. App. 7a).

ARGUMENT.

The central contention here pressed by petitioners—whether petitioners' settlement of their suits included their claim for injunctive relief as well as their claim for money damages—is manifestly narrow and no amount of exaggerated claims can convert the contention into one warranting review by this Court on certiorari. The decisions below turn on the particular facts of these cases, affect only the parties involved and are clearly correct. There is no conflict of decisions nor is there an important question of Federal law requiring decision by this Court.

1. The trial judge after participating in the actual settlement negotiations and discussions and hearing and observing witnesses at the September 26, 1960 hearing, reviewed the record and concluded that petitioners entered into a binding agreement settling their entire cases. As demonstrated above (pp. 9-10), the court below concurred in the findings and decision of the trial judge, and augmented them with additional conclusions with respect to questions not presented in the trial court.

Petitioners argue that the conclusion of the court of appeals, that settlement of the claim for injunctive relief was included in the settlement of the cases, was an issue of fact upon which the district court made no finding (Pet. 18, 25). However, it cannot be disputed that both the district court (104a, 106a) and the court of appeals (Pet. App. 7a, 10a) held that there was an agreement "to settle" the cases.

The district court's finding on this point is clear. It held that these cases were settled and that they would be dismissed in their entirety with prejudice (109a). Obvi-

ously, it is implicit in the court's holding that all aspects of the suits were to be dismissed.[6]

Petitioners also claim (Pet. 24-25) that the district court did not find that the parties had agreed to settle both aspects of the cases before the dispute arose over the form of release and, thus, that the court of appeals could not make such a finding. Petitioners base this claim upon the assertion that, since the district court judge stated that he had not considered "exactly what the total understanding reached on May 23rd was", he did not find agreement was reached on that date. The demonstrable fallacy of this contention reveals the absence of merit in the petition for certiorari.

First, as already demonstrated, the district judge did determine that a settlement agreement was reached on May 23 (104a, ftn. 4, 106a, 109a). Second, he did not state that he did not determine exactly what the settlement agreement was **with respect to these two cases.** To the contrary, as the full text of his opinion plainly shows (105a-106a), the phrase "total understanding" referred to the situation presented by the **ten** Pennsylvania cases.

Petitioners (Pet. 30) also attack the conclusion of the court of appeals that "* * * the parties entered into a valid contract to settle, upon condition that the other suits also be settled", as contrary to the statement of the district court that "* * * neither plaintiffs nor their counsel ever made settlement of these two cases * * * contingent

6. The reason that the settlement of both aspects of the cases was not specifically referred to in the district court's opinion is that no contention was made by petitioners, until after appeals had been taken, that only the claim for damages was settled. Indeed, petitioners' argument in the district court is inconsistent with their present argument, since it was then urged that no settlement was agreed upon—not that the damage claim only was contemplated in the settlement. Mr. Smith objected to the release solely because it would have interferred with the proposed transfer of the theatres (85a-86a, 49b), and this was the only reason averred in petitioners' answers to respondents' petitions to dismiss with prejudice (72a).

on the settlement of the other eight cases" (105a). There is no inconsistency whatever between the views of the two courts. The respondents' promise was conditioned on the settlement of the ten cases, all raising the same issue.[7] This contingency—in the nature of a condition subsequent—was known to and agreed to by petitioners' counsel as part of the settlement agreement (Pet. App. 9a). There was no condition on petitioners' promise and a valid contract existed which neither party could repudiate during the short period required to satisfy the condition on respondents' promise (Pet. App. 10a).

2. Once it was decided that there was a valid agreement to settle these cases in their entirety, both courts below rejected petitioners' attempt to use a dispute over the tendered release as an excuse to repudiate this agreement. Accepting the parties' construction of the disputed clause in the release—that it involved a "* * * relinquishment of the right to complain of the continuation of the licensing procedures which had been challenged * * *" (Pet. App. 7a)—the court below held that respondents were entitled to the tendered release because it did not go beyond but, rather, embodied the oral agreement already reached (Pet. App. 8a). Therefore, the court below held, respondents' insistence upon the proposed release could furnish petitioners with no basis for repudiation (Pet. App. 9a).

Respondents did not insist on the clause on which petitioners relied to justify their attempt to withdraw from their agreement but, at the hearing before the district judge, offered to eliminate the challenged language from the release (107b). The district judge pointed this out (104a,

7. The reason for respondents' position is obvious. If all the cases were settled, respondents would be spared the expense and burden of litigating the common issue. If, on the other hand, respondents had to try any of the cases, the practical course would have been to proceed to decision before considering settlement of the remaining cases.

108a) and observed that petitioners' proper remedy, if they objected to the papers tendered in implementation of the settlement agreement already made, was not to repudiate but to insist on what they considered a proper release (104a, ftn. 4). The district judge also stated that the release was in "* * * normal, reasonable language * * *" for the purpose of the agreement (104a, ftn. 5).

The critical fact here is that both courts below held that there was a valid settlement agreement before any dispute arose over the terms of the release and that that agreement covered all aspects of the cases.

3. Petitioners argue that they were deprived of their right to a jury trial. Despite the fact that this argument was raised for the first time in the court of appeals, that court nevertheless disposed of it on the ground that such right, if any, had been waived (Pet. App. 10a).

The parties agreed that the hearing judge should take testimony; witnesses were examined and cross-examined; briefs were submitted; and petitioners argued to the district court that no settlement agreement had been effected. Petitioners cannot now be heard to say that they thought that such procedure was for the purpose of "getting on the record" certain facts and preserving the dignity of the district court (Pet. 27). This is diametrically opposed to the record, as revealed by Judge Van Dusen's statement to Mr. Rome at the conference of September 12, 1960 (39a-40a). At the time of the hearing, on September 26, 1960, Mr. Ball appeared for petitioners, conceded he had read the notes of the September 12th conference (3b), agreed to the taking of testimony and presented Messrs. Smith and Schlanger as witnesses. If petitioners had any right to jury trial, that right was effectively waived.

4. There are no conflicting decisions and the decision below does not raise any important Federal question. Petitioners cannot refer to any other cases similar to theirs,

and their elaborate theorizing on contracts implied in law and implied in fact, and their pious discussion of the nature of antitrust enforcement, cannot obscure the fact that this litigation is significant only to the litigants. These cases present merely an odd fact situation arising out of petitioners' unique behavior in selling their claims and negotiating settlement at the same time.

Petitioners endeavor to bolster their plea for review by also claiming, apparently, that since civil antitrust suits are intended to supplement government enforcement of the antitrust laws, public policy requires that the rules of law governing settlement of such suits should be different from the rules governing other litigations. Many private antitrust suits, as well as government suits, have been settled. The argument that petitioners make here in an effort to justify their repudiation of the settlement agreement, if adopted, would certainly discourage settlement of antitrust cases. Antitrust cases are no exception to the maxim that the law favors settlements.

As we have demonstrated (*supra*, pp. 3-4, the negotiations leading to settlement of petitioners' cases and the eight other Pennsylvania cases were conducted on a case-by-case basis, with due regard for the claims of each plaintiff and with the knowledge and approval of all counsel, the district court and, subsequently, the court of appeals. Petitioners themselves expressly agreed to accept $10,000 for their cases. The district court expressed the view that a refusal to settle a case unless related cases were also settled was perfectly proper where no unfair disadvantage was imposed upon any party (38a, 64a).[8] There is no

8. The out-of-context quotations by petitioners (Pet. 30, ftn. 9) with respect to so-called "package settlements" is also misleading. As the record shows (64a) the communication from the Chief Judge protested against the conditional settlement of groups of personal injury cases where it was felt that the right of one client was being traded for the right of another without being fair to plaintiffs who were of limited education. The trial judge here noted that businessmen were involved in the present cases and that they acted deliberately.

basis whatever for argument that the settlement agreement in this case is against public policy.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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